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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 193

DAVID H. RUBINGER and WILLIAM R. McALLISTER,

Petitioners,

against

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANSWERING BRIEF FOR PETITIONERS

Herein, petitioners answer the brief submitted by the respondent in opposition to the petition for certiorari. We regret that we are required to point out that

(i) The description of the theory of the Court of Appeals in the respondent's brief is wrong;

(ii) The respondent's brief withdraws assurances given by the respondent's counsel to Judge Bryan of the District Court that they would not use parol evidence to support any interpretation of the Regional Merchandiser's Agreement;

(iii) The respondent's brief contains many misleading statements about the evidence;

(iv) Finally, the respondent's brief completely misses the importance of this case in American commercial law.

POINT I

Respondent's brief misrepresents the theory of the Court of Appeals.

Respondent's brief denies that the Lumbard opinion held that petitioners, Rubinger and McAllister, could not resell Capenart sets, which they bought from the defendant. Respondent says that all it held was that the petitioners were a sales agent. Respondent says that "The Court was silent on whether petitioners could resell what they bought". (See Respondent's Brief, pp. 3-4.)

We ask this Court not to be misled by the respondent's statement, but to read the opinion of the Court of Appeals (particularly the paragraphs found on pages 34, 35 and 36 in the Appendix to the Petition for the Writ of Certiorari). There that Court found, as its first premise, that the petitioners could not resell Capehart sets bought from defendant because there was no power of resale or "words of resale" expressed in the Regional Merchandiser's Agreement. It was from this first premise, that the Court concluded that petitioners were without power to resell merchandise and hence were not distributors but only solicitors of orders.

We also point out that if the Lumbard opinion did not hold that the petitioners were restrained from reselling Capehart sets, then, under that opinion, the petitioners were permitted to resell them. Yet, no one who reads that opinion can describe any type of buyer to whom the petitioners could resell—with the possible exception of the

defendant itself. We can test this by trying to imagine a buyer to whom the petitioners could resell under Judge Lumbard's construction of the Regional Merchandiser's Agreement. No such buyer can be imagined. He certainly envisaged a restraint on resale. A restraint under which a purchaser of goods can resell only to the one who sold to him is in fact a total restraint. But even a partial restraint is illegal. (See our Petition, pp. 10, 11 and 12.)

To confirm that the Court of Appeals actually decided as we stated, we set out below two questions and the answers which must be given to them on any fair reading of the Lumbard Opinion. The questions and their obvious answers are:

Q. Did the Court of Appeals hold that under the Regional Merchandiser's Agreement the petitioners were entitled to purchase and become the owner of some Capehart sets? A. Yes, the Court of Appeals so held and said "these provisions do show that Rubinger-McAllister was expected to purchase some products from Capehart." (See Opinion at p. 34 of the Appendix to the Petition.)

Q. Did the Court of Appeals hold that products purchased by Rubinger-McAllister could not be resold by them? A. Yes, the Court of Appeals so held. It said "it is an essential premise of their theory of recovery that the agreement between Capehart and Rubinger-McAllister entitled the latter to purchase merchandise *for resale*, i.e., that it . . . was also a distributor purchasing for its own account *and reselling at a profit* . . . *We reject this premise* . . .". (See Appendix to Petition, p. 33.)

"Although these provisions do show that Rubinger-McAllister was expected to purchase from Capehart, *they say nothing about the right to resell.*" (p. 34)

"Capehart had no duty to sell its products to Rubinger-McAllister *for resale.*" (p. 36)

No one can read the opinion of the Court of Appeals without realizing that its basic theory was that while the Regional Merchandiser's Agreement gave petitioners a right to purchase Capehart sets, it withheld from them the right to resell, imposing a restraint under which they could not resell; but could only use the sets in their own business.[1]

POINT II

Respondent's brief repudiates assurances given by respondent's counsel to Judge Bryan.

Respondent's counsel repeatedly assured Judge Bryan, on the trial of the action, that they were not offering any parol evidence for the purpose of having it used in the interpretation of the Regional Merchandiser's Agreement. The Trial Court on at least three occasions questioned counsel and obtained from them an assurance that evidence offered was not to be used in interpretation of the agreement. (See the Record, pp. 365, 390 and 1151.) Counsel for the respondent assured Judge Bryan that there was no ambiguity in the Regional Merchandiser's Agreement and no need to use parol evidence. On this assurance and on the ruling of the Court, the plaintiffs did not introduce parol evidence (although it was available to them), which would have confirmed that the plaintiffs were entitled to buy and sell Capehart sets. However, the respondent's brief now repudiates the assurances so given to Judge Bryan and attempts to use parol evidence in interpretation of the agreement. Thus, on page 13 of respondent's brief,

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[1] The respondent's brief also misrepresents the theory of the Trial Court. The Trial Court actually held that the petitioners had a right to buy and sell Capehart sets but that they had no right to order a *quantity* as large as the thousands of sets in the entire inventory of the defendant. The Trial Court did not deny that the petitioners had a right to buy and sell smaller quantities of Capehart sets. The Trial Court's theory was not used by the Court of Appeals, no doubt because it obviously overruled *N. Y. Central Iron Works v. Hudson Radiator*, 174 N. Y. 331.

respondent tries to use the defendant's Distributor's Franchise Agreement as such parol evidence. This was one of the documents that defendant's counsel assured Judge Bryan would not be so used. Also, on page 15 of respondent's brief, respondent tries to establish a course of conduct to interpret the agreement.

The Court of Appeals said expressly, in a footnote to its opinion, that the Distributor's Franchise Agreement should not be given any consideration. (See p. 35 of the Appendix to the Petition.)

We submit that the Regional Merchandiser's Agreement clearly sets forth a right to resell Capehart sets. (See Point III of the Petition for Certiorari.) Moreover, the power of the Regional Merchandiser to buy and sell Capehart sets was recognized about a dozen times by the defendant when it sold merchandise to the petitioners after having been advised that they intended to resell it for their own account.

POINT III

The respondent's brief makes misleading claims about the evidence.

Not only is it unsound for the respondent to use extrinsic evidence in interpretation of the Regional Merchandiser's Agreement, it is also grossly wrong to make references to the evidence, which are false and misleading. We indicate below only a few of the respondent's misleading statements concerning the evidence:

1. Respondent says that petitioners, Rubinger and McAllister, had a *surreptitious* practice of buying Capehart sets for their own account and reselling them to dealers. This is completely false. The truth is that Rubinger-McAllister submitted *written* orders for the Capehart sets which they bought for their own account. Those orders show that Rubinger-McAllister was the purchaser and also

show the name and address of the dealer to whom Rubinger-McAllister Corporation intended to resell the merchandise. These written orders are in the record. The defendant's acceptance stamps on them show that many of them were accepted as late as May 3, 1956.

2. Respondent's statement that orders for their own account were not placed after April 12, 1956, is misleading. In fact, defendant accepted such orders and shipped them as late as May 3, 1956, a few days before defendant sold its entire business to Gross Distributors Co. Moreover, petitioners' attempts to place other orders with defendant in April and May, 1956 were halted by the arbitrary refusal of the defendant to receive any communication from the petitioners.

3. Respondent's description of the practices of the defendant in selling its Capehart sets is also misleading. Respondent says that the defendant's selling "through regional sales representatives had superseded an earlier marketing arrangement carried out by area distributors . . . ". (Respondent's Brief, page 7.) Actually, the arrangement which superseded the earlier marketing arrangement was an arrangement by which regional *merchandisers* took the place of area distributors. They were regional *merchandisers*, not regional *sales representatives*. The respondent cleverly misdescribes them as sales representatives. Actually the Regional Merchandiser was not a mere sales representative. The Regional Merchandiser had a combination franchise under which the plaintiffs were granted two types of powers, (1) the power to buy Capehart sets for their own account, with the right to resell them to retail stores for their own profit (or to rent them to hotels, hospitals and other institutions), and (2) the power to solicit orders from retail stores to be forwarded to the defendant for acceptance by it. Such combination agreements are common in the television and appliance industry. Williston mentions them in his work on Contracts, Vol. IV, Section 1027A, page 2847 (1936).

It was because the Regional Merchandiser had greater powers than a distributor that McAllister properly stated that his company "was not considered a *distributor.*" It had more extensive powers although its powers also included those of a distributor. Speaking precisely, his company was considered to be a *merchandiser.*

4. It is false to say, as respondent's counsel do on page 7 of their brief, that the merchandiser was freed of the risk of ownership. Actually on purchases for their own account they were required to accept responsibility for paying for the merchandise, whether or not they successfully resold it.

5. Also false is the respondent's statement that unrebutted testimony shows that the defendant advised petitioners that it would refuse to accept any order placed in their name because petitioners had effected unauthorized releases of merchandise from Capehart's warehouse (see Respondent's Brief, p. 8). There is no evidence to support this.

Many other misleading statements are made by the respondent. However, the question now is whether the Court of Appeals was correct in interpreting the Regional Merchandiser's Agreement. Extrinsic and parol evidence may not be considered here because such evidence was excluded by the Court of Appeals itself. (See Appendix to Petition, p. 35.)

POINT IV

The respondent's brief misses the importance of this case.

In our petition for certiorari, we pointed out the national importance of this case. (See Petition, p. 28.) We showed that the Court of Appeals (in the Lumbard opinion) places sales agency contracts in a new class, subject

to new and unorthodox contract requirements. Now, without discussing our arguments, the brief for the respondent makes some irrelevant remarks about the importance of the litigation which seem to have no point at all. We comment as follows:

Respondent says in its brief (see footnote, p. 18) that there is no telephone number for the "N. Y. Retail Daily". As a matter of fact, this publication has a telephone number and a large office in New York. Its telephone number is Algonquin 5-5252 and its office is at 7 East 12th Street, New York City, N. Y. The name of the publication has recently been changed to "Home Furnishings Daily".

The respondent also says that the Professors of Law at Columbia University School of Law, New York University School of Law and Fordham University School of Law, permitted their names to be used on our brief submitted in the Court below. Rather than being a weakness, the fact that these experts (whose specialty is the field of commercial law) were interested enough to give their services in connection with our brief below shows that this matter is one of great importance in commercial law. Other professors of commercial law, including Professors Bacon and Calamari, likewise find this matter of great commercial importance and disagree completely with the new and revolutionary theory of the opinion below.

Law reviews have been anxious to write up this case, but we are advised that it is unethical to discuss a pending litigation in the public press.

Every trade association of electronic manufacturers and every trade association of distributors in the country is interested in this case.

The claim by the respondent that the Regional Merchandiser's Agreement is a "usual" form of agreement,

and a "standard" form of agreement, shows that the decision of the Court of Appeals will have widespread application to thousands of such agreements throughout the country, in many industries.

The Court of Appeals (in the Lumbard opinion) has overruled local statutes including the New York Sales Act, and the new Uniform Commercial Code. It has overruled the United States Supreme Court itself in the decision of that Court in *Miles Medical Co. v. John D. Park*, 220 U. S. 373, 404. It has overruled all the New York cases cited in our petition.

Conclusion

In conclusion, we repeat:

If Judge Lumbard's opinion did not find an implied restraint on resale, then it would be possible to describe some type of buyer to whom the petitioner could resell the Capehart sets they were entitled to purchase. But under the terms of the Lumbard opinion, no such buyer can be described with the possible exception of the defendant manufacturer itself. Such a restraint directed against sales to all other persons was illegal.

We respectfully warn this Honorable Court that respondent's brief is unreliable. Except for its first three paragraphs and its first three footnotes, every other paragraph and footnote contains some distortion, more or less serious, or some innuendo more or less misleading. We cannot discuss these, one by one, without exhausting this Court. But we do point out that they all concern evidence extrinsic to the Regional Merchandiser's Agreement. The Court of Appeals, itself, barred such evidence as an aid in the interpretation of that agreement. (See Appendix to Petition, p. 35, footnote.) Hence our basic question now is whether the Lumbard opinion cor-

rectly interpreted that agreement, as written. On this question, the respondent's brief sheds no light at all and offers not one citation of authority.

Fortunately the Regional Merchandiser's Agreement is fully set forth in the ~~Appendix to our Petition~~ Record and cannot be misquoted. On reading it, this Honorable Court will see that the Lumbard opinion's analysis, devoid as it is of any precedent or citation to support it, is a hasty and superficial effort. Further, on the facts and circumstances of this case, it is doubtful whether the Court of Appeals *en banc* was able to complete any adequate review of the Lumbard opinion when the petition for rehearing was presented. In any event, the Lumbard opinion clearly overrules the decisions of the United States Supreme Court and the New York courts and contravenes the New York Sales Act and Personal Property Law. It will lead to commercial chaos in New York and wherever else it is hereafter cited, unless this Honorable Court steps in and corrects this aberration.

Respectfully submitted,

WILLIAM J. ROONEY,
Attorney for Petitioner.

Of Counsel:

LEONARD F. MANNING.